



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Code Red For Homeland Security and Presidential Power

Bargaining About Terrorist Threats

We were told last week that the National Treasury Employees Union (NTEU) had filed a grievance against the color-coded terrorist threat advisory system. Under that system, there are five “threat conditions” with the color red representing a *severe threat* and the color green representing a *low threat*. Both the probability of an attack and the harm that would be caused by an attack are to be considered when assessing a threat.

Many who heard of NTEU’s grievance responded with a kind of light-hearted incredulity (“They did *what*?” “You’re kidding!”). The President of NTEU told Fox News that the Union’s complaint had been mischaracterized – and in a way, she’s correct. There is nothing even slightly amusing about that complaint.

On August 20, 2002, the Customs Service amended its Alert Level Directive to comport with the five-level system established by the President. The amended Directive said, “It is the policy of the United States Customs Service to thwart the operations of terrorist organizations by detecting, disrupting, and preventing the cross-border travel of terrorists, terrorist funding, and terrorist implements, including Weapons of Mass Destruction (WMD) and their precursors.” The Directive went on to specify the responsibilities of Customs employees and departments for each of the five threat levels from low (green) to severe (red).

On September 18, 2002, NTEU filed a complaint against Customs alleging that the Directive of August 20 constituted an unfair labor practice because the agency (1) had failed “to consult or negotiate in good faith” with the Union, and (2) had “interfered with, restrained, or coerced” its employees in the exercise of their rights. The Union isn’t objecting to the color-coding of terrorist threats; it is objecting to deploying Customs employees to fight terrorism without first bargaining with the Union.

The Customs Service Directive says, for example, that when the country is under a severe (red) threat of terrorism that –

- “annual leave may be cancelled for necessary personnel” (§6.1.5.6);
- “personnel may be fully deployed to heightened threat locations” (§6.3.5.2); and
- “personnel may be redirected to address critical emergency needs” (§6.4.5.1).

NTEU wants the Federal Labor Relations Authority to decide if the President of the United States and the Commissioner of Customs have this kind of authority during a code-red threat.

When better understood, NTEU's position provokes bewilderment, exasperation, and dismay, not light-hearted incredulity. NTEU's president said we had misunderstood.

As the Senate decides among the options listed below, it may be helpful to remember NTEU's complaint, and what it means for the future of homeland security:

Homeland Security Proposals: Comparing Presidential Powers With Respect to Labor-Management Relations On Behalf of National Security

<u>Current Law</u>	House-passed <u>H.R. 5005</u>	SA #4471 <u>(Lieberman)</u>	SA #4738 <u>(Gramm-Miller)</u>	SA #4740 <u>(Nelson <i>et al.</i>)</u>
5 USC 7103(b)(1)	Section 762	Section 187(f)	Section 731	Section 731(a)
President may issue an order to exclude an agency or subdivision if he determines that it "has as a primary function intelligence, counter-intelligence, investigative, or national security work" and the provisions of the chapter 71 "cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations." (applies government-wide)	<u>In addition to requirements of current law</u> , adds same requirements as does SA #4740 but these new requirements "shall not apply in circumstances where the President determines in writing that such application would have a substantial adverse impact on the Department's ability to protect homeland security."	An entity transferred into DHS (or that performs functions transferred to DHS) <i>could not be</i> subject to an order under section 7103(b); also, for entities that are in DHS through means other than transfer, the Lieberman Amdt. provides a new standard requiring that duties be "directly related to terrorism investigation."	Same as House-passed provision but with additional requirement that when the President makes a relevant determination he "shall notify the Senate and the House of Representatives of the reason for such determination not less than 10 days prior to its issuance."	<u>In addition to requirements of current law</u> , a presidential order <i>cannot</i> go into effect within DHS <i>unless</i> the "mission and responsibilities of the agency (or subdivision) materially change" <i>and</i> "a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counter-intelligence, or investigative work directly related to terrorism investigation."

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